

DOCUMENT RESUME

ED 254 595

UD 024 118

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TITLE Statement of the Assistant Attorney General, Civil Rights Division before The Federalist Society Symposium on Equality and the Law.
INSTITUTION Department of Justice, Washington, D.C. Civil Rights Div.
PUB DATE 2 Mar 85
NOTE 12p.; Statement made at Georgetown University Law Center (Washington, DC, March 2, 1985).
PUB TYPE Viewpoints (120)
EDRS PRICE MF01/PC01 Plus Postage.
DESCRIPTORS Affirmative Action; Civil Rights; Employment Practices; *Equal Opportunities (Jobs); Labor Market; *Salary Wage Differentials; *Sex Discrimination; Sex Fairness; Social Bias
IDENTIFIERS Civil Rights Act 1964 Title VII; *Comparable Worth

ABSTRACT

Comparable worth is a concept not merely alien but also inferior to the traditions of the American people. The thesis that jobs of "comparable worth" demand pay equivalency--at least as between male-dominated and female-dominated occupations--is unworthy of serious attention in both legal and economic terms. The consequences of accepting in the United States a system of compensation based on comparable worth would all be bad. The main criticisms of comparable worth are: (1) it is concerned neither with employment discrimination nor compensation discrimination but with the redistribution of wealth along gender lines; (2) it is difficult to determine how one would ascertain whether a certain job was comparable in value to another; (3) in an open economy individual compensation is determined not by the intrinsic societal value of the job but by the marketplace factors of supply and demand; (4) the wage gap between genders can be explained by factors other than gender-based discrimination; (5) as Title VII of the Civil Rights Act of 1964 requires only a showing of intentional discrimination, the demands of comparable worth go far beyond Federal civil rights legislation; and (6) comparable worth would increase taxes, require expensive administration, and increase unemployment. (RDN)

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Department of Justice

ED254595

STATEMENT

OF

WM. BRADFORD REYNOLDS
ASSISTANT ATTORNEY GENERAL
CIVIL RIGHTS DIVISION

BEFORE

THE FEDERALIST SOCIETY
SYMPOSIUM ON EQUALITY AND THE LAW

GEORGETOWN UNIVERSITY LAW CENTER
Washington, D. C.
SATURDAY, MARCH 2, 1985
2:30 P.M.

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The panel discussion this afternoon is probably miscast as a civil rights issue, and it is, therefore, perhaps useful, by way of introducing the debate to follow, for me to spend a few minutes preliminarily putting the assigned topic of "comparable worth" into some meaningful perspective.

There are, for instance, a few misconceptions that can, and should, be removed at the outset. First, "comparable worth" has very little to do with gender-based discrimination, and even less to do with "pay equity." In fact, those intent on advancing the doctrine of "comparable worth" are quick to acknowledge that their thesis goes beyond the legal command of "equal pay for equal work" -- a proposition with which we all can agree. When Congress passed the Equal Pay Act in 1963, it wove forevermore into the fabric of our antidiscrimination laws the fundamental principle of "pay equity" -- and, not insignificantly, at that time explicitly rejected "comparable worth" as an aspect of "pay equity," or, indeed, as a concept worthy of legislative attention. The following year, Congress went even further to protect against discrimination in matters of employment, prohibiting in Title VII of the Civil Rights Act of 1964 the exclusion of any person from the workforce on account of race, sex, color, religion or national origin.

It is one of the anomalies of the "comparable worth" doctrine -- advertised as a remedial device to redress a so-called gender bias in wages and salaries -- that it assumes no sex-based exclusion from targeted jobs (i.e., men and women can

enter freely on the basis of merit) and assumes as well that those hired (both men and women) in each such job receive equal pay for equal work. In other words, "comparable worth" proponents do not suggest (as they cannot) that men wishing to be nurses, secretaries or grade-school teachers are being denied entry to those professions because they are male, or that a different pay scale attaches to them in each such job than to their female counterparts. Similarly, they make no claim that females wanting to be truck drivers, coal miners or accountants are being excluded from those occupations because of sex, or that those hired receive pay unequal to their male counterparts. Title VII and the Equal Pay Act are designed to deal with such discriminatory behavior -- and do so very effectively -- and the doctrine of "comparable worth" is neither needed nor intended to assist in that enforcement effort.

It is, therefore, well to recognize as the "comparable worth" debate unfolds that the remedial wage adjustment required by this doctrine flows not from any legitimate concern over employment discrimination (i.e., gender-based exclusion) or even over compensation discrimination (i.e., unequal pay for equal work). Rather, "comparable worth" is a theory which has as its central aim solely to accomplish a redistribution of wages and salaries in this country along gender lines in a manner more in keeping with its proponents' preconceived notions of an ordered society. The technique used need only be described to expose its many flaws.

Thus, the doctrine has application not to all jobs, but only to a select number of jobs: i.e., those readily identifiable as predominantly (70+%) female or predominantly (70+%) male occupations. The trick is to "match up" one of the female-dominated jobs (e.g., nursing, secretary, librarian) with one of the male-dominated jobs (e.g., truck driver, sanitation worker, accountant) on a comparability scale that purports to measure the value of each to society. A growing number of self-anointed "experts" look at such purely subjective factors as employee knowledge and skill, mental demands, accountability and working conditions, assigning points to each, and then (for a whopping fee) declare in accordance with their assigned mission that society regards certain "blue collar" occupations and "pink collar" occupations to be of comparable value.

We can all engage in the debate over whether one job should be viewed as comparable in value to another, and there are likely to be as many views as there are participants in the discussion. Is nursing comparable to truck driving? Does your answer differ if what is being transported is blood plasma or highly explosive materials, as opposed to tennis balls or widgets? Does secretarial work register in the same range as garbage collection on your comparability meter? Is your answer different if the garbage remains uncollected for three weeks? What about for six weeks?

The point is that, while comparative valuations of this sort are perhaps of academic interest, they have about as much utility as playing any other game of "trivial pursuits." For, the "worth" that a consulting "expert" predicts society places on a job -- any job -- bears no realistic relationship to what the employer is prepared to pay as salary to those performing that job. Professional athletes in many instances earn tenfold as much as the most experienced heart surgeon. Some rock stars and a number of entertainers, including news commentators, earn far more than Supreme Court Justices and Cabinet Secretaries. Hugh Hefner and Larry Flint outearn many Chief Executive Officers of our largest and most reputable corporations.

The same can be said for the earning potential of any employees in jobs supposedly of "comparable worth." It is not, in a free and open economy (and indeed never has been), the intrinsic societal value of the job that sets individual employment compensation, but rather the marketplace factors of supply and demand, as influenced from time to time by both internal and external forces. Low demand and an overabundance of graduates from nursing schools will most assuredly have a depressing affect on the salaries of nurses, whatever the "worth" of that job to society, just as surely as high demand and a shortage of applicants will tend to inflate the salary levels of truck drivers, no matter how one assesses their "comparable worth" to nursing. Moreover, union involvement and collective bargaining

negotiations can skew wages and other employee benefits in unpredictable ways having virtually nothing to do with the job's intrinsic value -- and, by the way, also absolutely nothing to do with discrimination.

The "comparable worth" thesis ignores these marketplace realities, and therein lies perhaps the most glaring of its many flaws. Once the retained "expert" declares two jobs to be of "comparable worth" to society and notes a discrepancy in employee salaries between the male-dominated and female-dominated occupation, the assumption indulged (and it is no more than an assumption) is that the wage gap is due, at least in part, to gender-based discrimination inherent in the marketplace. There are, of course, any number of explanations for such salary differences: for example, women who choose to combine professional careers with family responsibilities tend to enter the job market later, or leave for a time to raise children, to work part-time in many cases, or opt for regular hours rather than overtime. Decisions to start a family may also interrupt higher education plans for some women and thus directly impact on the timing of job advancement and salary increases. While such considerations do not appear to provide a full explanation for wage differences in so-called "comparable" male-dominated and female-dominated jobs, they plainly form a part of it. And, when combined with other gender-neutral market forces relating to supply and demand, there is precious little of the discrepancy that remains for speculation.

What little there is, moreover, cannot legally be assigned to what the "comparable worth" proponents describe as inherent marketplace gender discrimination -- at least not under our Federal civil rights laws as currently written and interpreted by the courts. For Title VII simply does not permit an inference of unlawful discrimination on a showing of nothing more than statistical wage disparity. Rather, in matters of compensation (as distinguished from employment selection), Title VII requires a showing of intentional discrimination -- that is, that the employer set wages in the female-dominated job below the going market rate because of sex. Comparable worth's total disregard for the "intent" factor renders it wholly bankrupt as a legal doctrine -- as the Ninth Circuit recently made clear in the lead appellate court decision in this area. See Spaulding v. University of Washington, 740 F.2d 686 (9th Cir. 1984), certiorari denied on November 26, 1984.

The thesis, then, that jobs of "comparable worth" demand pay equivalency -- at least as between male-dominated and female-dominated occupations -- is not, in either legal or economic terms, worthy of serious attention. And yet, efforts to advance such a position (misguided as they are) plainly cannot be disregarded. For, the consequences of accepting a system of compensation in this country based on the not so exacting science of "comparable worth" are, to put it bluntly, all bad.

The real dollar costs involved in the upward-ratchet of the lower paying job to the one offering higher pay are staggering -- and it is an essential prong of the "comparable worth" theory that the ratchet is always one way: up. In the district court AFSME case out in the State of Washington, for example, where the "comparable worth" doctrine was accepted by the Judge (albeit on the shakiest of legal reasoning), the wage adjustment has been reliably estimated to be close to \$400 million in the first year and \$60 million every year thereafter. Not surprisingly, the State has already made clear that these costs, if allowed to stand on appeal, would be passed on to the already overburdened taxpayers. Nor does the innocent taxpayer escape "comparable worth" costs if they are levied in the private sector; the only difference is that they then get passed along not as taxes but through higher consumer prices.

Nor do these costs include the extravagant expense that would necessarily be incurred in establishing a comprehensive government apparatus in order to administer such a contrived system of compensation in both the public and private sectors. A whole new layer of bureaucracy would have to be superimposed on the free market to initially evaluate jobs and fix wages, and then regularly to undertake job reevaluations and, as required, constant wage readjustments. Was it not the experience elsewhere, outside the United States, of similarly elaborate and manipulative regulatory regimes designed to set a "just wage" or "just price"

that prompted Adam Smith to expound on the virtues of leaving such matters for the market economies to decide? The doctrine of comparable worth effectively turns its back on the marketplace and thus, as with other hierarchies put in place in pursuit of a "just wage," promises to leave everyone worse off than before.

The employer saddled with increased labor costs will likely be confronted with a need to cut the size of his workforce, leading not only to increased unemployment but predictably also to declining productivity. A similar possibility is not farfetched for the employer who once could use its higher wage to attract employees to do the less pleasing jobs. With the compensation incentive removed, both employment and productivity could well drop. What follows, of course, is economic decline.

Nor does comparable worth offer much to the employee. It can be expected that job opportunities in both the male-dominated and female-dominated occupations would be reduced. As this occurs, competition for vacant positions will inevitably become more intense, and thus necessarily lengthen the unemployment lines. It really matters not in these circumstances whether more women than men find themselves out of work, or vice versa. The point is that the overall disruption to the workforce occasioned by subjecting market economies to a manipulative outside force -- be it government officials, courts, special masters or legislative bodies -- bent on setting a "just wage" in the name of "comparable worth," leaves no real beneficiaries. Even those who might

ultimately be counted among the few to survive employment rifts or layoffs and actually receive a salary increase should consider themselves fortunate if they realized much in the way of a net gain after taxes once all costs were accounted for.

And what, pray tell, after this effort to disengage from market economies in search of a "just wage," has been accomplished with respect to the overriding concern of sex discrimination that, we are told, resides in subtle and undetectable ways in the marketplace? I suspect that the candid answer is "nothing at all." Jobs identified as male or female before application of a "comparable worth" remedy will, by all accounts, remain largely unchanged once the "higher-pay" incentive for women to move to traditionally male jobs has been removed.

That leaves as the tools best suited to fight gender-based discrimination in the workforce, those that have been utilized so effectively over the past twenty years. Aggressive enforcement of Title VII during that era to ensure women equal employment opportunities, combined with vigorous enforcement of the Equal Pay Act, has served to maintain a healthy trend of increasing mobility of women into jobs traditionally held by men.

The vision of a commercial republic is even more compelling today than it was two centuries ago when James Madison and Alexander Hamilton brilliantly mapped the blueprint for it. For ours is a republic in which the fledgling market economy of the late Eighteenth Century has grown beyond expectations, offering

unparalleled opportunities to successive generations of Americans, helping to create a society of hopeful movement rather than one of status. In this republic, the market economy, not some government oligarchy, has determined wages. In this republic, all individuals -- now male and female alike -- are free to move from job to job, as far as skill and talent can carry, or personal inclination and family needs advise. In this republic, the role of government today is to ensure that all individuals enjoy equal opportunity to achieve, and that equal work is indeed equally paid.

Comparable worth is a concept not merely alien but also inferior to our traditions as a nation, and it deserves neither legal, economic nor political support.

Thank you.